

MEMORANDUM

TO: Tim Luke and Jennifer Berkey  
Water Distribution, IDWR

FROM: Susan Hamlin Nygard, *shn*  
Deputy Attorney General, IDWR

DATE: October 15, 2003

SUBJECT: Winter Stock Water Delivery in Basin 34

You have requested a memorandum regarding delivery of stock water in Basin 34 during the wintertime. The watermaster has received a number of inquiries on how the winter stock water will be handled. The question you have posed to me is how much water can be delivered to get the .02 cfs of stock water to the property.

The following quantity remark is included in most partial decrees for stock water: "The appropriator is entitled to the quantity of water described for stock water purposes at a point of measurement where the delivery ditch enters the place of use described." The explanatory material for the stock water right may describe the delivery ditch and the number of head of cattle. If the stock water right is part of an irrigation right, the water right includes a total diversion rate limitation for the water use, which limits the delivery of the stock water. In other words, to get the water to the point of measurement during the non-irrigation season the amount diverted cannot exceed the total diversion rate of the water right. Also implied with the rights and confirmed by IDWR Rules for Distribution is that the delivery of the stock water during the non-irrigation season cannot constitute waste.

The general provisions for Basin 34, as decreed by the SRBA court, address winter stock water issues. General Provision 2, *2-B Gage and Stock Watering During Non-Irrigation Season*, states the following:

During the time period from November 1 of each year to the beginning of the next irrigation season (the "non-irrigation" period), all or a portion of the water of the Big Lost River flowing into Mackay Reservoir may be diverted, according to priority, for storage under water right numbers 34-00012 and 34-10873 provided the natural flow at the 2-B gage is not less than fifty cubic feet per second. During the non-irrigation period, natural flow water rights downstream of Mackay Dam and senior in priority to water rights numbers 34-00012 and 34-10873 may be diverted for domestic and livestock uses under water rights authorized for these purposes.

The clause, "according to priority" implies that wintertime stock water uses upstream from the Mackay Reservoir may divert if they are senior in time to the storage

rights. Additionally it states that senior rights downstream from Mackay Dam may divert for domestic and livestock uses from the 50 cfs.

The *2000 Supplemental Director's Report for Basin-Wide Issue 5-34* dated September 11, 2000, further describes General Provision 2. It states:

General Provision 2 defines and provides for efficient administration of the water rights by specifying when water can be diverted to storage in Mackay Reservoir in preference to earlier in time rights for non-irrigation uses. The general provision further defines that a release of 50 cubic feet per second (cfs) is necessary and sufficient at all times to provide adequate water for domestic and stockwatering uses downstream of Mackay Dam.

The general provision defines the relationship between the storage rights and the domestic and stockwater rights. It provides for efficient administration of the water rights by assuring that water needed for irrigation the next season is available for storage. It further provides for efficient administration by defining an appropriate flow for domestic and stockwater uses without requiring a continual review and revision of the flow released from the dam, as would be required if the release were adjusted to meet changing demands for beneficial use and futile call issues associated with the sink areas downstream from the dam.

Finally, the Idaho Department of Water Resources Water Distribution Rules for Water District 34, IDAPA 37.03.12.06, Winter (Non-Irrigation Season) Stock Water, further define non-irrigation season stock water use. During the non-irrigation season, the storage of water in Mackay Reservoir is superior to all rights from the Big Lost River with points of diversion downstream from Mackay Dam subject to the minimum release at the 2-B Gage. Winter stock water can be called for and delivered pursuant to the list of water rights if it does not interfere with storage in Mackay Reservoir by requiring a release of water in excess of the minimum release required at the 2-B Gage or the actual release, whichever is greater. A right holder calling for delivery of stock water must have access to a diversion point and delivery system to convey the right to the place of use recorded in the list of water rights. If the headgate and delivery system are controlled by an entity other than the water user, the watermaster will only deliver the water with the concurrence of the owner of the headgate and delivery system and then only when such delivery does not constitute unreasonable waste as determined by the Director.

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In sum, winter stock water rights upstream from the Mackay Reservoir may divert if their partial decree provides for such use and if they are senior in time to the BLRID storage rights 34-00012 and 34-10873. Senior rights downstream from Mackay Dam may also divert for non-irrigation season stock water, if their partial decree provides for such use, up to the amount of the minimum release required at the 2-B Gage or the actual release, whichever is greater.

If the right includes the remark that allows delivery to the point of measurement, the amount diverted cannot exceed the total diversion rate of the water right and delivery of that water cannot constitute unreasonable waste as determined by the Director. Finally, if there is no remark referencing delivery to the point of measurement then the right is limited to the diversion rate for stock water measured at the point of diversion.

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